

UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

IN THE MATTER OF,

NM HOLDINGS COMPANY, LLC  
\_\_\_\_\_ /

NM MOLD & ENGINEERING  
CORPORATION,

Plaintiff,

v

CAROL SHELBY, et al,

Defendants.  
\_\_\_\_\_ /

NM HOLDINGS COMPANY, LLC,

Plaintiff,

v

WINGET, et al,

Defendants.  
\_\_\_\_\_ /

NM HOLDINGS COMPANY, LLC,

Plaintiff,

v

VENCO MANAGEMENT CANADA,  
LTD.,

Defendant.  
\_\_\_\_\_ /

Case No. 03-48939

Detroit, Michigan

September 20, 2006

1:59 p.m.

Adversary No. 04-4125

Adversary No. 04-4373,

Adversary No. 05-4963

FILED (1)

2006 OCT -6 3:29

COURT  
DETROIT

1 NM HOLDINGS COMPANY, LLC, Adversary No. 05-4964  
2 Plaintiff,  
3 v  
4 MILLARD DESIGN AUSTRALIA  
5 PARTY, LIMITED,  
6 Defendant.  
7 \_\_\_\_\_/

8 NM HOLDINGS COMPANY, LLC, Adversary No. 05-4968  
9 Plaintiff,  
10 v  
11 LINDEN CREEK REAL  
12 ESTATE, LLC,  
13 Defendant.  
14 \_\_\_\_\_/

15 NM HOLDINGS COMPANY, LLC, Adversary No. 05-4972  
16 Plaintiff,  
17 v  
18 WINGET,  
19 Defendant.  
20 \_\_\_\_\_/

21 MOTION HEARING  
22 HONORABLE THOMAS J. TUCKER  
23 TRANSCRIPT ORDERED BY: JOEL APPLEBAUM, ESQ.

24 APPEARANCES:

25 For the Trustee: JOHN KARACZYNSKI, ESQ.  
Akin, Gump, Strauss, Hauer,  
& Feld  
2029 Century Park East  
Suite 2400  
Los Angeles, CA 90067-3012  
310-229-1020

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

JOEL APPLEBAUM, ESQ. (P36774)  
EDWARD HOOD, ESQ. (P42953)  
Clark, Hill  
500 Woodward Avenue  
Suite 3500  
Detroit, MI 48226  
313-965-8591

STUART GOLD, ESQ. (P27766)  
Gold, Lange & Majoros  
24901 Northwestern Highway  
Suite 444  
Southfield, MI 48075  
248-350-8220

For Larry Winget:

JOSEPH DAVIS, III, ESQ.  
Greenberg, Traurig, LLP  
One International Plaza  
Boston, MA 02110  
617-310-6204

KEVIN FINGER, ESQ.  
KIMBERLY DESHANO, ESQ.  
Greenberg, Traurig  
77 W. Wacker Drive  
Suite 2500  
Chicago, IL 60601  
312-456-8400

RALPH MCKEE, ESQ. (P39484)  
DEBORAH FISH, ESQ. (P36580)  
Allard & Fish, P.C.  
535 Griswold Street  
Suite 2699  
Detroit, MI 48226  
313-961-6141

For Alicia Winget, Brian  
Winget, Gwendolyn Cameron,  
Atalicia Tigginelli, Golf  
Course Services, Winget  
Construction Services:

POWELL MILLER, ESQ.  
MARTHA OLIJNYK, ESQ. (P60191)  
Wiener & Gould  
950 W. University Drive  
Suite 350  
Rochester, MI 48307  
248-841-9401

1 For N. Matthew Winget, Linden Creek Enterprises, M & M Flow  
2 Through Systems, Linden Creek Real Estate:  
3 FRANK MANDLEBAUM, ESQ. (P17046)  
430 Rolling Rock Road  
Suite 100  
Bloomfield Hills, MI 48304  
313-875-8080

4 For Venture Australia,  
5 Venture Asia, Miller Design Australia:  
6 SETH GOULD, ESQ. (P45465)  
Wienner & Gould  
950 W. University Drive  
Suite 350  
Rochester, MI 48307  
248-841-9401

7 For Carol Shelby, Shelby  
8 International, and Shelby  
9 Court Recorder:  
10 GORDON GOLD, ESQ. (P14087)  
Seyburn, Kahn, Ginn, Bess &  
Serlin  
2000 Town Center  
Suite 1500  
Southfield, MI 48075  
248-353-7620

11 Transcriber:  
12 Diane Bullis  
LaShonda Moss  
13 Deborah Kremlick

14  
15  
16  
17  
18 Proceedings recorded by electronic sound recording, transcript  
19 produced by transcription service.  
20  
21  
22  
23  
24  
25

1 (Court in Session)

2 THE CLERK: Please rise. This Court is back in  
3 session. You may be seated.

4 The Court will call case number 04-4125, 04-4373,  
5 05-4963, 05-4964, 05-4968, 05-4969, and 05-4972.

6 THE COURT: All right. Good afternoon to everyone.  
7 We've called all of these cases at one time just to get that  
8 formality out of the way.

9 I want to start out by having everyone state their  
10 appearance for the record and then I will talk a bit about the  
11 order in which I envision handling this event this afternoon.  
12 But I'm going to be open to suggestions, good suggestions from  
13 anyone about what order makes the most sense if anyone has  
14 them. Why don't we start then with appearances starting with  
15 the plaintiff's side in these cases?

16 MR. KARACZYNSKI: Good afternoon, Your Honor. John  
17 Karacyznski on behalf of the trustee.

18 MR. APPLEBAUM: Joel Applebaum, Clark, Hill on  
19 behalf of the trustee.

20 MR. HOOD: Edward Hood, Clark, Hill also on behalf  
21 of the trustee.

22 THE COURT: Mr. Gold is here. Good afternoon, Mr.  
23 Gold. Others. Anybody else on the plaintiff's side? All  
24 right, defendant's side. Let's start with the Winget and --  
25 well, let's start with Mr. Winget.

1 MR. DAVIS: Good afternoon, Your Honor. Jody Davis  
2 on behalf of Mr. Winget.

3 MR. FINGER: Kevin Finger on behalf of Mr. Winget.

4 MR. MCKEE: Ralph McKee on behalf of Mr. Winget.

5 MR. MILLER: Your Honor, my name is Powell Miller  
6 and Martha Olijnyk from my firm is here with me. We represent  
7 Alicia Winget, Brian Winget, Gwendolyn Cameron, Atalicia  
8 Tigginelli, Golf Course Services, and Winget Construction  
9 Services.

10 MR. MANDLEBAUM: Your Honor, my name is Frank  
11 Mandlebaum.

12 THE COURT: Hold on. Wait a minute, just a minute.

13 MR. MANDLEBAUM: Sorry.

14 THE COURT: Golf Course Services and what was the  
15 last one?

16 MR. MILLER: Winget Construction Services.

17 THE COURT: All right. Thank you. Mr. Mandlebaum.

18 MR. MANDLEBAUM: Yes, Your Honor. I represent N.  
19 Matthew Winget. I also represent Linden Creek Enterprises,  
20 M & M Flow Through Systems. Those are actually the same  
21 corporate entity, and Linden Creek Real Estate.

22 THE COURT: All right. Thank you.

23 MR. GOULD: Good morning -- good afternoon, Your  
24 Honor. Seth Gould of Weiner and Gould. I represent Venture  
25 Australia, Venture Asia, and Miller Design Australia.

1 THE COURT: All right. Anyone else on the defense  
2 side?

3 MR. GOLD: I'm over here just because they ran out  
4 of room, Your Honor. I'm Gordon Gold. I represent Carol  
5 Shelby, Shelby International, and Shelby Automobile.

6 THE COURT: All right. Anyone else? All right.  
7 And I understand we don't have anyone on the telephone today.  
8 Our information is we have not received information that there  
9 was supposed to be anyone on the telephone today, but our  
10 normal Court Recorder is out sick today, so if any of you know  
11 of anyone who is supposed to participate by phone, let me know  
12 that because we're not aware of it. Anyone know about  
13 anybody?

14 MR. DAVIS: No, Your Honor.

15 THE COURT: Okay. Mr. Davis, you are on your feet.

16 MR. DAVIS: Yes, Your Honor. We actually have an  
17 attorney who as a preliminary matter needs to be admitted pro  
18 hac vice with the Court's --

19 THE COURT: Pro hac vice?

20 MR. DAVIS: -- submission. Excuse me, admission --  
21 I should know better than that. Admission into this district.

22 THE COURT: All right. Let's do that.

23 MS. FISH: Good afternoon, Your Honor. Deborah Fish  
24 from the law firm of Allard and Fish. I'm here today to

25 sponsor Kimberly M. Deshano from the Chicago office of  
03-48939-tjt Doc 4040 Filed 10/06/06 Entered 10/10/06 06:33:59 Page 7 of 30

1 Greenberg, Traurig. May I approach the bench with her card?

2 THE COURT: Sure.

3 MS. FISH: Thank you.

4 THE COURT: Thank you. Just a question on your --  
5 never mind, never mind. Okay. Ms. DeShano, welcome. I'll  
6 swear you in.

7 MS. DESHANO: Thank you, Your Honor.

8 (ATTORNEY KIMBERLY DESHANO WAS SWORN)

9 THE COURT: All right. I'll sign your card here.  
10 All right. I've signed your card. I'll return that to you.  
11 That goes back to the District Court and Ms. DeShano, welcome  
12 to the Bar of our Court.

13 MS. DESHANO: Thank you, Your Honor.

14 THE COURT: All right. One moment here. All right.  
15 I had -- I had in mind starting the hearing today with two  
16 things.

17 First is -- first is to find out if there are any motions  
18 among all these, these 23 motions I think that we scheduled  
19 for hearing today that are either resolved, no longer objected  
20 to, moot, otherwise do not require a hearing. I think there  
21 are some in that category and I'll talk about that in a  
22 minute.

23 Then I had in mind of the substantive motions to hear, I  
24 had in mind hearing in case 04-4373, the bifurcation motion  
25 and the Winget motion to dismiss. I think in one of the prior

1 scheduling conferences that was described perhaps by Mr.  
2 Finger as the most comprehensive of the motions, the many  
3 motions to dismiss in these cases.

4 I recognize there is some overlap or common arguments  
5 made among the motions before us today. I set this large  
6 number of matters for hearing today because I assumed that the  
7 -- that everyone who is here would want to be here even if I  
8 was only hearing a smaller subset of the motions, including  
9 the two that I just identified.

10 And I do want everyone to have an opportunity to be heard  
11 on their motion. And would of course encourage everyone to --  
12 certainly to with respect to all of these motions, certainly  
13 to feel free to argue and advocate for your client as you see  
14 best. But would urge you within that -- with that caveat of  
15 course, to try to avoid repetition.

16 To the extent you're making an argument that is made in  
17 another motion and in the oral argument before you stand up,  
18 you just -- there's lots of things you agree with, you don't  
19 have to repeat those, you can just add anything else or any  
20 other thoughts or comments you want to add regarding that  
21 argument. That will of course save a lot of time if we can do  
22 that.

23 I should say also that there were some motions that we  
24 missed in setting these hearings. That is motions that I

25 would have liked to have set for today as well, but we -- we  
03-48939-tjt Doc 4040 Filed 10/06/06 Entered 10/10/06 06:33:59 Page 9 of 30

1 missed them. And we've remedied that already by yesterday, I  
2 think noticing next -- for next Wednesday at 2:00 o'clock,  
3 motions in those cases. There are two of those cases, 03-5356  
4 and 04-5178.

5 Now, getting back to my -- the first thing I alluded to  
6 and that is it appears there are some -- there may be some  
7 motions in this group that was assigned for notice for hearing  
8 for today that are resolved, moot, mooted, not objected to.  
9 And I do want to identify those at the outset if we could.

10 And then the -- assuming that we'll start with the motion  
11 to bifurcate and the motion to dismiss, we'll ask counsel for  
12 Mr. Winget to speak first regarding those motions. With  
13 respect to motions that may not be in dispute or otherwise are  
14 mooted, it struck me that that list might include, it looks  
15 like there are four motions in the various cases that are  
16 basically motions to extend time asking for an extension of  
17 time for the particular defendants involved to answer the  
18 complaint after there is -- a specified period of time after  
19 there's a ruling on their motion to dismiss involving motions  
20 -- to the extent there are motions to dismiss that don't seek  
21 dismissal of the entire action against those parties.

22 An example of that is the one filed by Mr. Winget, et al  
23 in 04-4373 which I noticed the -- the committee filed a  
24 statement saying they do not object to the motion. Apparently  
25 there was never an order entered terminating those motions.

1 So they were still on our books and so we set them for  
2 hearing.

3 So there may be several in that group. And then there's  
4 another motion that I want to ask about which is the -- in --  
5 there's a substitution motion involving the committee which  
6 was filed while this -- the Venture case was still a Chapter  
7 11 case in case number 05-4963 that might no longer -- might  
8 now be moot, and I wanted to find out about that so that we  
9 can -- if there's some underbrush that we can clear out right  
10 away, then let's -- I'd like to do that.

11 So, who wants to speak to these -- to this underbrush, so  
12 to speak? Someone for the trustee?

13 MR. APPLEBAUM: Your Honor, I don't think we have a  
14 complete list of the cases actually. I was unaware about the  
15 motion to substitute and I'm not sure what the nature of that  
16 motion was. I assume it can be disposed of pretty easily. It  
17 doesn't have to be argued today. I think what it was if  
18 memory serves me, is that we were substituting in taking over  
19 from the debtor in part on some of the claims prior to the  
20 conversion of the case.

21 THE COURT: Yeah, it was pre-conversion.

22 MR. APPLEBAUM: Uh-huh.

23 THE COURT: I -- you know, without studying it real  
24 closely, I assume that it's -- it was mooted by the conversion  
25 of the case. But it was filed in 05-4963, NM Holdings versus  
03-48939-tjt Doc 4040 Filed 10/06/06 Entered 10/10/06 06:33:59 Page 11 of 30

1 Venco Management, August 15, 2005.

2 I'm sorry, no, okay. It was filed early in the case of  
3 docket No. 3 in that case, joint motion and brief in support  
4 by the debtors and the Official Committee of Unsecured  
5 Creditors, order granting substitution of the Official  
6 Committee of Unsecured Creditors in place of the debtors as  
7 sole plaintiff, et cetera, et cetera, standing to the Official  
8 Committee to receive claims on a nunc pro tunc basis to the  
9 date of the filing of the complaint against defendant Venco  
10 Management Canada.

11 It seems to me we had a hearing on a similar motion that  
12 was opposed and --

13 MR. APPLEBAUM: And the Court granted it.

14 THE COURT: -- relief was granted. But that was --  
15 must have been still when the case was a Chapter 11 case.

16 MR. APPLEBAUM: That's correct.

17 THE COURT: This -- this a motion, the -- I assume  
18 the trustee would succeed to the -- to this and to the -- the  
19 original movants, the debtor and the committee as movants  
20 here.

21 And so, you know -- you know, I just raise the question  
22 it would appear that that is moot. Does -- does somebody have  
23 a different view on that?

24 MR. APPLEBAUM: No, I don't, Your Honor. I mean the

25 motion -- we filed the joint motion and briefs in support in  
03-48939-tjt Doc 4040 Filed 10/06/06 Entered 10/10/06 06:33:59 Page 12 of 30

1 all of the adversaries that were filed originally by the  
2 debtors and which we intervened and then those which we hadn't  
3 intervened. And the Court did grant the joint motion in every  
4 case, I believe.

5 So consequently I'm not sure why the order wasn't entered  
6 in this case as well. But given what's transpired since then  
7 and the conversion, I would have no problem dismissing this  
8 motion as moot.

9 THE COURT: The party that objected to it was the  
10 defendant Venco Management Canada, Limited which was  
11 represented by the same people that represent Mr. Winget.

12 MR. APPLEBAUM: That's right.

13 THE COURT: Ralph McKee, Deborah Fish, Greenberg,  
14 Traurig firm. So that --

15 MR. APPLEBAUM: And we had --

16 THE COURT: Is that a motion to --

17 MR. APPLEBAUM: -- and we had a hearing on it, I  
18 think so, I mean given that there's a trustee now, I think so.

19 THE COURT: Anybody disagree?

20 MR. DAVIS: It's been a long time since any of us  
21 have looked at the paperwork, but I can't imagine it would be  
22 anything other than moot.

23 THE COURT: All right. I will deem that motion moot  
24 due to the subsequent conversion of the underlying main case  
25 to Chapter 7.

1 Now what about these motions to extend regarding time to  
2 answer the -- I think there are about five of them. And I  
3 confess I've not read every single one. I read a couple and  
4 said oh, this is all the same thing.

5 Does the trustee succeeded I think to -- or is relying on  
6 the paperwork filed before conversion by the committee and the  
7 debtors on these. The committee filed a response, I think to  
8 the -- all these saying they don't object. So really it's  
9 just needed an order or to get shoved off from my desk like  
10 that to get rid of those.

11 MR. KARACZYNSKI: We have no objection to those  
12 extensions being granted.

13 THE RECORDER: Would you mind stating your name?

14 MR. KARACZYNSKI: I'm John Karaczynski.

15 THE COURT: All right. Anybody have anything they  
16 want to say about those motions?

17 MR. FINGER: No, Your Honor, we'll prepare an order.

18 THE RECORDER: And you, sir?

19 MR. FINGER: Kevin Finger for Mr. Winget.

20 THE COURT: All right. All right. So we need an  
21 order in each case with respect to each motion granting it. I  
22 think the -- at least the motions that I looked at of these  
23 asked for 20 days after the Court ruled on the motion to  
24 dismiss, so put that in the order.

25 I think the -- the original form of order just said  
03-48939-tjt Doc 4040 Filed 10/06/06 Entered 10/10/06 06:33:59 Page 14 of 30

1 motion is granted. Let's put in the order itself 20 days.  
2 The trustee want to review that order? These orders that Mr.  
3 Finger is going to prepare?

4 MR. FINGER: Yes, Your Honor.

5 THE COURT: All right. So, Mr. Finger should send  
6 the order to who?

7 MR. APPLEBAUM: Mr. Applebaum.

8 THE COURT: All right. So those motions will be  
9 granted with order to follow.

10 All right. Then unless anybody has a -- a better idea of  
11 where to start from hearing the motions than what I suggested  
12 and you know, I'm open to any good ideas, believe me. I want  
13 to start with the -- the two motions I identified. And I  
14 think I want to begin with the bifurcation motion. Anybody  
15 want to suggest that we do it some other way.

16 MR. DAVIS: That's fine by us, Your Honor.

17 THE COURT: All right. So who is going to speak for  
18 Mr. Winget, et al on the bifurcation motion?

19 MR. DAVIS: Your Honor, I will.

20 THE COURT: And again this is the -- the motion in  
21 04-4373 -- just a moment. The joint motion by defendants  
22 Larry Winget, Sr. and several others for bifurcation of issues  
23 for discovery and trial. All right, Mr. Davis.

24 MR. DAVIS: Thank you, Your Honor. On the motion to  
25 bifurcate, I want to start off by saying that in typically

1 speaking motions to bifurcate are filed at the commencement of  
2 the case, or at least early on in the proceedings and -- and  
3 while the Court certainly is aware that this was filed early  
4 in the proceedings, I don't think that the Court should take  
5 from the passage of time that it somehow has become moot.

6 As the Court is aware, discovery in this case has not  
7 commenced in the manner that we, and by we, I think I can  
8 speak for the collective we of all the people in this room,  
9 thought that it would. And as a result the issues that are  
10 actually addressed in it really haven't changed.

11 What I would like to say, however, Your Honor, is  
12 something that I don't think you're expecting. It's our  
13 intention to file by the end of the week a motion for  
14 implementation of a discovery management plan.

15 As this Court knows at least generally, the documents  
16 that all of the parties need to go forward are currently tied  
17 up in separate set of proceedings. The 6<sup>th</sup> Circuit's opinion  
18 with regard to that is still in the process of implementation.  
19 We are all stuck while that process works itself out. And  
20 none of us really controls that process.

21 We are trying not to get in the way of the course of  
22 these proceedings moving forward. I really want to reiterate  
23 to the Court, we have tried throughout these proceedings to  
24 come up with proposals to keep the case moving and our

25 intention is to file a more detailed plan for the Court that  
03-48939-tjt Doc 4040 Filed 10/06/06 Entered 10/10/06 06:33:59 Page 16 of 30

1 would help Your Honor and the parties do that. And we'd like  
2 to do that promptly.

3 We're trying to get it together as quickly as we can, but  
4 as I told you on Monday in the other matter, that developments  
5 are happening at this general time and so we haven't been able  
6 to get anything in before the Court any earlier. I frankly  
7 would like to speak to my brethren on the other side. They  
8 may not be objecting to some of our thoughts and we'd like to  
9 engage them in a dialogue over, and I am actually remiss for  
10 having not called them this morning because it was my  
11 intention to do so and just forgot. To engage them in that  
12 dialogue.

13 I don't know what their position is on bifurcation  
14 anymore for example. We haven't discussed it with them in a  
15 very long time. But the current circumstances I think compel  
16 all of the parties to be creative in coming up with ways to  
17 keep the case moving without impacting the variety of other  
18 issues, some of which we control, and some of which we don't.  
19 So that the cases don't just sit, stalled in neutral while  
20 people are waiting for things to happen like documents being  
21 released so that we can actually review them.

22 THE COURT: Let me -- let me just say for the record  
23 at this point for those who may not be aware of it, on Monday  
24 of this -- Monday morning of this week we had a initial

25 scheduling conference in 18 adversary proceedings that were  
03-48939-tjt Doc 4040 Filed 10/06/06 Entered 10/10/06 06:33:59 Page 17 of 30

1 filed in the Deluxe bankruptcy case.

2 And during that conference which was attended by counsel  
3 for both sides, Mr. Davis was here and talked a little bit  
4 about the status of what was going on post remand from the 6<sup>th</sup>  
5 Circuit decision that dealt with Judge Borman's decision of  
6 about a year ago regarding handling claims of privilege in  
7 connection with a Grand Jury subpoena.

8 And so just for the benefit of those who were not here on  
9 Monday morning, I did receive some information on the record  
10 during those conferences from Mr. Davis about, although not --  
11 not much in the way of concrete information because he didn't  
12 have it, about what's going on there. To the extent those who  
13 weren't here Monday morning, I assume that most of the people  
14 in the room may have some idea of what's going on in that  
15 proceeding but I don't know who knows what and, you know, I  
16 think -- I just wanted to bring to everyone's attention that  
17 we have had fairly recently some discussion about that.

18 Mr. Davis at the time based on what you said on Monday  
19 morning it does not, unless something has happened since then,  
20 it doesn't appear that you can really -- you really have a  
21 very good idea of how long the process that's being set up  
22 across the street will -- so to speak in that other  
23 proceeding, will take.

24 And when documents will be available to the defendants  
25 and for that matter to the trustee. And so I guess I'm  
03-48939-tjt Doc 4040 Filed 10/06/06 Entered 10/10/06 06:33:59 Page 18 of 30

1 curious as to what the discovery management plan is going to  
2 be other than geez, we'll get them as soon as we can get them.

3 MR. DAVIS: Well, Your Honor, what we're trying to  
4 do is trying to stage the discovery so that we can move it  
5 forward in a manner that minimizes the impact of any  
6 inaccessibility that the parties may have to at least certain  
7 of the records.

8 THE COURT: Okay. So you have some creative ideas  
9 for trying to do that.

10 MR. DAVIS: We're trying to be. I mean we're trying  
11 to -- to be as productive as we can under the circumstances.

12 THE COURT: Well, but you've not sharing any of this  
13 with the other side?

14 MR. DAVIS: No, and I will. And as I said, I  
15 actually am remiss because it was my intention to call them  
16 this morning and I -- and I literally forgot and that is my  
17 fault.

18 But I think that in terms of -- of the presentation of  
19 these issues to Your Honor, if we got something on file by the  
20 end of the week unless our dialogue with the -- the plaintiffs  
21 is such that -- that as a group we decide to hold off a little  
22 bit to see if maybe collectively we can't come up with  
23 something. I understand under the rules they have 18 days to  
24 respond.

25 But we can certainly schedule something in the three week  
03-48939-tjt Doc 4040 Filed 10/06/06 Entered 10/10/06 06:33:59 Page 19 of 30

1 period unless they wanted to do it faster. There's no rocket  
2 science to this, it's literally case management stuff. But  
3 we're trying not to delay your ability to try to get these  
4 cases properly organized in a way that they can move forward.

5 But it just seemed a little -- it just -- as I sat down  
6 and prepared for this discussion, it occurred to me that  
7 knowing that we're going to try to come up with a more  
8 detailed plan that in our eyes would fit with this, but  
9 probably could be segregated from this if the Court did not  
10 want to bifurcate, it made no sense to have that argument  
11 today and then two or three weeks from now coming back again  
12 to talk about more detailed parts.

13 That to me is a -- a more organic subject that could be  
14 discussed at once that would be more productive. And as I  
15 said it may well be that we can work with them on something  
16 that would -- would work, I don't know. I literally have not  
17 had any discussions with them about how to do it.

18 THE COURT: Well, what do you want to do about the  
19 bifurcation motion then pending the filing of this motion that  
20 you said you're going to file at the end -- by the end of the  
21 week which is two days?

22 MR. DAVIS: I would suggest putting it off for  
23 hearing at the same time that our discovery management plan  
24 motion which I realize hasn't been filed yet, but that would  
25 be scheduled. I'm happy to pick a date with you for the date,  
03-48939-tjt Doc 4040 Filed 10/06/06 Entered 10/10/06 06:33:59 Page 20 of 30

1 that's -- that's fine. I mean that's the easy part.

2 And I'd like to move it along. I don't want to -- for  
3 some reason they want to file opposition papers that are more  
4 extensive than I would think they would be. I don't want to  
5 cut their time short, but at the same time I'm happy to move  
6 it along on a prompt basis. It just seems to me that those  
7 two should be heard together as opposed to motions to dismiss  
8 and the bifurcation.

9 THE COURT: Well, all right. So I assume this is  
10 all news to the trustee. What does the trustee -- what's the  
11 trustee's reaction here?

12 MR. KARACZYNSKI: John Karaczynski on behalf of the  
13 trustee. Your Honor, I think it makes sense to hold over the  
14 bifurcation motion until we see -- see the case management  
15 motion. I suspect that what we're going to see in the case  
16 management motion is some attempt at bifurcation and that  
17 there will -- there will be some synergy between the two  
18 motions. And so if the Court -- it makes sense then, you  
19 know, from our standpoint and for us to see that case  
20 management motion before the Court considers both of the  
21 motions.

22 THE COURT: Well, all right. So it seems to me that  
23 Mr. Davis, it makes sense for you to have an opportunity to  
24 discuss this -- your ideas -- your side's ideas on this with  
25 counsel for the trustee before you file the motion. And I

1 think you probably had that in mind too.

2 Which means that potentially to minimize objections and  
3 disputes about it, work out what you can work out and then  
4 just we'll have hearings and arguments about what you can't on  
5 that.

6 MR. DAVIS: Yes, Your Honor.

7 THE COURT: The -- you need to talk to the other  
8 side then before you file the motion, right? I assume you  
9 want to do that.

10 MR. DAVIS: I would prefer to do that. We, I think  
11 can send him an advance copy of at least the draft management  
12 plan order. You know, so they can see the details of what we  
13 have in mind so we can talk about it with him. We can  
14 probably get that to him tomorrow.

15 But yes, we would want to talk it over with him. I  
16 didn't ask for their schedules. Unless Mr. Karaczynski and  
17 Mr. Applebaum aren't around the balance of the week, this week  
18 would be a great time to do it so we can get something on file  
19 by the end of the week if we need to file a motion.

20 THE COURT: Get something on file in two days?

21 MR. DAVIS: Yes, Your Honor.

22 THE COURT: All right. So what about the trustee's  
23 availability to discuss this with Mr. Davis and company?

24 MR. KARACZYNSKI: Your Honor, I'm available to

25 discuss it on Friday. Tomorrow I'm staying over the night and  
03-48939-tjt Doc 4040 Filed 10/06/06 Entered 10/10/06 06:33:59 Page 22 of 30

1 flying back tomorrow, so I'm going to be on an airplane for a  
2 good part of the day tomorrow going out to Los Angeles.

3 But -- but I certainly can discuss it -- you know, be  
4 available to discuss it either Thursday afternoon, assuming my  
5 flight arrives on time, or Friday, you know, any time on  
6 Friday.

7 MR. DAVIS: I forgot. Mr. Karaczynski actually had  
8 told me that. Maybe Monday then we would file something, Your  
9 Honor. We can speak to Mr. Karaczynski on Friday.

10 THE COURT: All right.

11 MR. KARACZYNSKI: Your Honor, from -- from our  
12 standpoint, I mean we share some of the frustration that's  
13 been expressed by -- by Mr. Davis about -- about the delay.  
14 And we do seem to be somewhat -- there are some documents that  
15 are not controlled by the post-remand issues and -- and yet  
16 the parties have not really made any substantial progress in  
17 exchanging those documents.

18 So we -- you know, we welcome to, you know, take a look  
19 at this case management approach and reserving our objections  
20 to object to bifurcation which had we argued the motion today,  
21 that would be our continued position, that bifurcation is  
22 inappropriate.

23 THE COURT: Well, what about documents that are not  
24 controlled by the Grand Jury proceedings? Why haven't those  
25 been gotten by either side?

1 MR. KARACZYNSKI: Quite frankly, Your Honor, it's  
2 somewhat of a mystery to me. We -- there -- there -- I think  
3 there was an -- there was an exchange of communications about  
4 that and there was some -- I think there was some  
5 misunderstanding about what we were -- inability to produce a  
6 certain quantity of documents, a fairly limited quantity of  
7 documents but could not produce the bulk of the documents that  
8 were the basis of the Doeren Mayhew report because they're  
9 under the control of cadence, we don't have -- we don't have  
10 them and now they're tied up in the 6<sup>th</sup> Circuit post-remand  
11 issues.

12 Recently we have had dialogue about exchanging documents  
13 that are within the respective control of each side and -- and  
14 I think we have some agreement and in fact we were -- we were  
15 promised some documents within the next week or so. The  
16 quantity of documents that we have to produce that we actually  
17 have control over is -- is -- is fairly small and we had  
18 engaged in some dialogue for a while about the means of  
19 producing those documents and dialogue about standing  
20 documents that became somewhat pointless when -- when it  
21 became apparent we were talking about a much smaller universe  
22 of documents because we just don't control, we don't even --  
23 we cannot even get possession of those documents that -- that  
24 underlie the Doeren Mayhew report.

25 So there have been some false starts. I don't think any  
03-48939-tjt Doc 4040 Filed 10/06/06 Entered 10/10/06 06:33:59 Page 24 of 30

1 side is really responsible for why there were false starts,  
2 but I think we -- we are at least sort of at the precipice of  
3 getting some documents and having an exchange of those initial  
4 disclosure documents.

5       Additionally we did send out a fairly -- numerous sets of  
6 -- of written discovery within the last 30 to 45 days to -- to  
7 many if not all of the defendants. And some of those  
8 deadlines have been -- have now been continued over. So we've  
9 attempted to make some progress when it became clear that we  
10 were going to get sort of wrapped around a pole as far as the  
11 post-remand issues are concerned.

12           THE COURT: All right. So --

13           MR. DAVIS: And, Your Honor, if I may.

14           THE COURT: Yeah.

15           MR. DAVIS: We will be producing documents within  
16 the next week or so as Mr. Karaczynski said. And that has  
17 nothing to do with the discovery management plan that we're  
18 talking about. We're not using that to -- to slow that  
19 process down. And I am assuming that the small body of  
20 documents that the plaintiffs have will also be produced in  
21 roughly that same time period.

22           MR. KARACZYNSKI: Yes, Your Honor, they will.

23           THE COURT: For the record, Mr. Davis, and I'll ask  
24 trustee's counsel the same question I guess too. And we  
25 talked about this a little bit on Monday morning.

1 But is it correct that you don't have any sort of  
2 reliable estimate of when the parties may be able to get  
3 access to these documents that are tied up in what I think Mr.  
4 Karaczynski referred to as the 6<sup>th</sup> Circuit post-remand  
5 proceedings?

6 MR. DAVIS: Yes, Your Honor. I'm not in a position  
7 to estimate when those records will be available to the civil  
8 litigants.

9 THE COURT: Mr. Karaczynski, you're in the same  
10 boat, are you?

11 MR. KARACZYNSKI: As far as I know, we're in the  
12 same ballpark, we have no idea.

13 THE COURT: All right. So the defendants then  
14 represented by Mr. Winget -- I'm sorry, by Mr. Davis, then are  
15 going to -- and this is 04-4373, but I assume you may want  
16 this to apply to other cases.

17 MR. DAVIS: Yes.

18 THE COURT: This case could be sort of the lead case  
19 for trying to hash these issues out, I suppose.

20 MR. DAVIS: That's the way we look at it.

21 THE COURT: Although I'd certainly want anybody else  
22 -- I don't want anybody left out of the loop on this who -- I  
23 want everybody to have an opportunity for their input on this  
24 to the extent they're going to be bound by this in these  
25 cases.

1 MR. DAVIS: We certainly, Your Honor, are  
2 communicating with other co-defense counsel.

3 THE COURT: Yeah, okay. All right. So you're going  
4 to file this motion no later than Monday, that would be  
5 September 25.

6 MR. DAVIS: Yes, Your Honor.

7 THE COURT: That's enough time you think?

8 MR. DAVIS: If for some reason it's not, the parties  
9 jointly will notify you. In other words the only thing that  
10 would slow it down is our communications.

11 THE COURT: All right. Do the parties want the  
12 normal response time for that if there are disagreements, or  
13 do you want to expedite this?

14 MR. KARACZYNSKI: Your Honor, we're willing -- I  
15 mean we're willing to expedite it, get a reasonable time to  
16 respond. You know, we -- the issues aren't going to be --

17 THE COURT: What do you want time wise?

18 MR. KARACZYNSKI: Ten days. So if the motion is  
19 filed on Monday, then the following Thursday.

20 THE COURT: All right. Instead of ten days, we'll  
21 say the date which is I believe, September -- I'm sorry,  
22 October 5.

23 And when you do file this motion, and again it might be  
24 delayed some which would push back this schedule, just submit  
25 an order with the revised schedule for response and so forth,  
03-48939-tjt Doc 4040 Filed 10/06/06 Entered 10/10/06 06:33:59 Page 27 of 30

1 we may have to adjust this. But let's set a -- let's just  
2 pencil in a hearing date on this if there are objections.  
3 Let's make it October 11, 2:00 p.m. That's a Wednesday, it's  
4 the Wednesday following the deadline for the trustee's  
5 response.

6 Now, you know, we can't officially notice and schedule a  
7 hearing in our system for a motion that hasn't been filed yet.  
8 So I would ask you when you -- when you actually file this  
9 motion to -- to contact the courtroom deputy, Mary, and let  
10 her know it's been filed, remind her that we need to set that  
11 -- set it for that date and time.

12 MR. DAVIS: We will do so, Your Honor. Do you want  
13 to postpone this hearing then for that same date and that will  
14 sort of block the time?

15 THE COURT: We'll -- we'll -- yeah, we'll schedule a  
16 further hearing on the bifurcation then for that same date and  
17 time. And that we can do officially in the system, so that's  
18 -- that's going to be the date for further hearing on the  
19 bifurcation motion.

20 Now given what we're doing, is there anybody in the room  
21 that wants to say anything further about the bifurcation  
22 motion today? No, okay.

23 All right. Then that brings us then to the motion by Mr.  
24 Winget and other defendants in 04-4373 who are represented by

25 Mr. Davis and company. Just change -- referring to that, Mr.  
03-48939-tjt Doc 4040 Filed 10/06/06 Entered 10/10/06 06:33:59 Page 28 of 30

1 Jody Davis and company.

2 MR. DAVIS: I'm sure Messers Greenberg and Traurig  
3 would love that.

4 THE COURT: The motion to dismiss, in part the  
5 adversary complaint. Mr. Davis.

6 MR. DAVIS: Thank you, Your Honor. With the Court's  
7 indulgence, what we would like to do is actually Mr. Finger  
8 and I will be dividing the argument. Mr. Finger will handle  
9 the issues, and I'll just use the general headings here, going  
10 back to our motion papers of fraudulent transfers, pleading  
11 standards which affects the breach of fiduciary duty and the  
12 preference claims in the context of the brief. In essence  
13 that would be pages roughly 7 to 22 of our original motion.

14 I will then handle after that the substantive  
15 consolidation, unjust enrichment, and judicial estoppel  
16 argument. The first two are roughly Pages 22 to 31 of our  
17 brief, using that as the framework and the judicial estoppel  
18 argument was in our supplemental memorandum that was filed  
19 sometime thereafter.

20 That takes in consideration our understanding that  
21 certain claims have been dropped by the plaintiffs and those  
22 would be the balance of the claims in the original complaint  
23 and that's consistent with what's in our reply brief. To the  
24 best of my knowledge certainly no one ever called us up

25 saying, oh, you missed it, we actually are still asserting --  
03-48939-tjt Doc 4040 Filed 10/06/06 Entered 10/10/06 06:33:59 Page 29 of 30

1 THE COURT: On that subject I assume that there's  
2 never been an order entered officially dismissing or --  
3 dismissing I guess would be the word, counts that the  
4 committee in their response indicated they no longer would --  
5 would pursue.

6 MR. DAVIS: Correct, Your Honor.

7 THE COURT: So with respect to that, I assume the  
8 parties can work out an agreed order for that much.

9 MR. DAVIS: I would think so, Your Honor.

10 THE COURT: Is that right, Mr. Karaczynski?

11 MR. KARACZYNSKI: Yes. Yes, Your Honor, we can work  
12 out an agree order on the dismissal of those claims that we're  
13 not pursuing.

14 MR. DAVIS: Thank you, Your Honor.

15 THE COURT: All right. Now, does -- Mr.  
16 Karaczynski, does Mr. Winget -- do Mr. Winget, et al have  
17 correct in their -- I think in their reply brief they gave a  
18 little chart at the beginning with a list of counts that they  
19 perceived were no longer being pursued. Is that a correct  
20 list?

21 I think that's Pages 3 and 4 of the reply. This is  
22 docket 180. There's a chart and it has line throughs, I think  
23 it's intended to be a list of counts that are no longer being  
24 pursued by the trustee -- now the trustee at least against the  
25 defendants represented by Mr. Davis.